Filed 4/20/10 In re K.B. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re K.B. et al., Persons Coming Under the Juvenile Court Law.	C062279
SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. M.S., Defendant and Appellant.	(Super. Ct. Nos. JD229239, JD229240, JD229241)

M.S. (Mother), the mother of five-year-old K.B., 11-year-old L.W., and 13-year-old S.W., appeals from orders of the Sacramento County Juvenile Court adjudging the children dependents and removing them from Mother's custody. K.B. was ordered placed in the home of a nonrelated extended family member. L.W. and S.W. were placed in the custody of their father, L.W., Sr., and their dependency was terminated.

On appeal, Mother contends (1) there was insufficient evidence to support the removal of the children from her custody, and (2) there were reasonable alternatives to removal. We shall affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

The dependency petitions alleged domestic violence between Mother and S.B., her boyfriend and the father of K.B. (Father), dating back to at least September 2005. The incidents may be summarized as follows.

September 2005 Incident

In September 2005 a domestic violence incident erupted while Father was holding then-nine-month-old K.B. The incident resulted in Father being cut by a knife that Mother had obtained from the kitchen.

Father told police he had asked Mother to make a bottle for the baby. Mother got mad and slapped Father's face. Father put the baby on the couch. Mother came after Father with a knife and tried to stab him. He wrestled the knife away from her and suffered a deep laceration to his right hand. Law enforcement arrived and both parents were arrested.

Mother told police she had informed Father that she would be moving out that day. An argument ensued and Father slapped Mother. She told one of the children to telephone 911. Mother grabbed a knife and pointed it at Father, telling him to never put his hands on her again. He grabbed the knife by the blade and cut his hand.

The oldest child, S.W., told police that he and his brothers were in the living room during the altercation. S.W. had to move the baby, K.B., out of the way in order to prevent him from getting hurt.

As a result of this incident, the family agreed to receive informal supervision services from the Sacramento County Department of Health and Human Services (DHHS). Mother's case plan included anger management, parenting education, and drug testing. The case closed in March 2006 after Mother completed all components of the case plan.

Fall 2007 Incident

In the fall of 2007 Father broke the windows of Mother's car while she was sitting in it. As a result, Mother obtained a restraining order against Father. Mother explained to a social worker that Father had stated, "If I can't have you, nobody will." Father explained to a social worker that he broke the windows because Mother had tried to run him over and was driving with him on the hood of the car.

November 3, 2007, Incident

In November 2007, after having learned that Mother was having an affair, Father destroyed "everything" in her apartment, including a table, window blinds, stereo equipment, and a television. According to Mother, she told Father to gather his bags and property and get out of her apartment. He yelled and cursed, so she telephoned 911. She left the apartment with her son because she was afraid that Father might

hurt her. Father told police, "I did what I did because the bitch cheated on me."

Argument Between Mother and Father

Evidently, in November 2008[1] Mother telephoned the sheriff's department and reported that she was arguing with Father. When law enforcement responded, they found no one at home and the door left unlocked. It appeared that the residents had left in a hurry.

Domestic Violence Incident on January 3, 2009

An incident on January 3, 2009, precipitated the February 2009 filing of the dependency petitions. Mother and Father got into an altercation that culminated in her throwing a large river rock at him, striking him in the head. As a result, Father suffered pain in the head and obtained medical treatment.

Earlier that evening, Mother had gone to a bar with her cousin, Sonja Taylor. Father and the children remained at Taylor's house. Taylor's niece, Tyona Gipson, was babysitting the children.

Gipson made a sexual comment that Father believed should not have been uttered in K.B.'s presence. Some name calling ensued and the incident escalated into a physical altercation. Witness accounts of the incident varied widely. Gipson's brother, Maurice Williamson, testified that he punched Father in the jaw and that Gipson hit Father with a toaster. Gipson

---

[1] The detention report incorrectly lists the date as November 8, 2009.

testified that she struck Father with a shoe, a frog lawn ornament, and a toaster. Father acknowledged that he had been hit one time with a shoe, but he denied that he had been punched or hit with a frog or a toaster.

Witness accounts also varied as to where in the house the children were located during this altercation. Williamson testified that the children were asleep in a cousin's room at the time that Father was hit. Gipson testified that the children were playing an electronic game in the cousin's room. Father testified that the children were playing a game on the television in the living room.

As a result of this altercation with the cousins, Father took the children back to their home. When Mother arrived home, she was very upset with Father and an argument ensued. Mother attempted to leave the home with two of her children, including K.B. Father would not let Mother drive the car because she had been drinking. Mother then began walking the children toward L.W., Sr.'s, house. Father followed in the car. Mother ran up to the car and started hitting Father. After the children reached L.W., Sr.'s, house, Mother attacked Father again and called him names. Eventually, she began walking the children toward Taylor's house. Father approached Mother in the car and said, "It's late. It's cold out here. Let me get [K.B.] back in the house." Mother grabbed a rock, ran up to the car window, and threw the rock through the window, hitting Father on the side of his head.

When Father saw how big the rock was, he looked at Mother and asked her what she was doing. Mother kept walking and yelled as she walked. Father had a serious headache and saw that his head was starting to swell.

A responding police officer retrieved a large river rock (eight to 10 inches in diameter and weighing approximately 10 pounds) from the car and noticed a small dent on the car that appeared to be new. Father told law enforcement that Mother had hit and stabbed him in the past, and that they fought all the time. Incidents usually occurred when Mother was drinking.

In an interview with a social worker, Mother denied that she threw a rock at Father and stated that police officers had arrested her based on her being confrontational and argumentative rather than for the alleged domestic violence. At the contested jurisdictional hearing, Mother admitted to arguing with Father, but she claimed the children were not present and she never hit Father with a 10-pound rock. Mother admitted that she had yelled at the police and they had threatened to take her to jail if she did not shut up.

Incident after January 3, 2009

Sometime after January 3, 2009, and prior to the children's removal, Mother drove Father to school with the children in the back seat of the car. Mother got angry and punched Father in the mouth. That afternoon, Mother apologized to Father and the children.

Petitions

On February 18, 2009, DHHS filed petitions alleging that the children came within Welfare and Institutions Code section 300, subdivision (b) in that (1) the parents have a history of domestic violence, including Mother hitting Father with a 10-pound rock and stabbing his hand; the violence occurred in the children's presence or while they were present in the home; and the parents' domestic violence places the children at substantial risk of physical harm; and (2) Mother has an anger management problem, has previously engaged in violent behaviors, and has previously stabbed Father in the hand; her anger management problem places the children at substantial risk of physical harm, abuse and/or neglect.[2]

Detention Report

Before the petitions were filed, Father told a social worker that he had telephoned law enforcement on January 3, 2009, and asked them to take a report. Father told the social worker that he had lied about Mother having thrown a rock at him. He stated he was upset but attempted to plead with law enforcement not to arrest Mother. He also denied any history of domestic violence between himself and Mother.

After the petitions were filed, the social worker again spoke to Father. When she explained the risk that domestic violence poses to the children, Father again denied that the

---

[2] All further statutory references are to the Welfare and Institutions Code.

rock-throwing incident had occurred and stated that he had lied to law enforcement. Mother told the social worker that Father had moved out of the house.

At the detention hearing, the juvenile court found that a prima facie showing of the section 300, subdivision (b) allegations had been made.

Jurisdiction-Disposition Report

In an April 2009 interview with a social worker, Mother admitted that she and Father had a history of domestic violence, but she denied that it had ever occurred in the presence of the children. She denied hitting Father with a rock and denied stabbing his hand. She claimed Father fabricated the rock incident in retaliation for her request that he move out of their home. She reiterated that she had been arrested only because she had refused the deputies' request to be quiet and claimed that all the pending charges from the incident had been dropped.

When the social worker noted that Mother had invited Father back into her home despite the restraining order against him, Mother stated that "the responsibility to enforce the restraining order was [Father's] as the restrained person, not hers as the protected person."

Mother at first was adamant that she would not participate in services with DHHS because she had done nothing wrong and Father is now out of the picture. She believed she did not need services and would not accept any because she had been violated in so many ways. Moreover, her children did not need protection

against her. Ultimately, she conceded that she would participate in services if ordered to do so. However, she was not open to participating in domestic violence services such as those provided by WEAVE.

In an April 2009 interview with the social worker, Father contended that he is the victim and Mother is responsible for all that has occurred in this case. He confirmed that Mother had hit him with the rock and his child had been present during the incident. When asked why he had recanted his claim during a previous interview with another social worker, Father acknowledged that he had recanted "at the request of the mother, who asked him to recant so [child protective services] would not remove the children."[3]

The social worker opined that, despite their self-serving statements to the contrary, Mother and Father have been engaging for years in a tempestuous and dangerous relationship for which both must take responsibility. They have a violent relationship and are ensnared in a cycle of domestic violence. Both have anger management problems and little impulse control. Due to the parents' lack of insight, there is little doubt they will reenact the cycle of violence. Because of the extreme level of denial and minimization, the children continue to be at risk. Although she had engaged in previous services, Mother gained

---

[3] Mother is an employee of Sacramento County Child Protective Services. To avoid a conflict of interest, the jurisdiction-disposition report was prepared by the Placer County Health and Human Services Administration.

little or no insight into the deleterious effects that domestic violence has upon children. Once Mother is participating in and benefiting from services, it would be appropriate for the children to return to Mother's care under departmental monitoring and supervision.

Hearing and Court Ruling

Mother, Father, and three cousins testified at the jurisdiction hearing. Following brief arguments by counsel, the juvenile court found there was "more than sufficient evidence" to sustain the petitions by a preponderance of the evidence. Then, turning to disposition, the court found by clear and convincing evidence that there was substantial danger if K.B. were returned home, and there were no reasonable means to protect his well-being without removing him from the parents' custody. The court ordered Mother and Father to participate in reunification services.

The court removed L.W. and S.W. from the custody of Mother and committed them to the care of their father.

DISCUSSION

I

Mother contends the juvenile court's finding that removing the children from her custody was necessary for their protection is not supported by sufficient evidence, "given the heightened burden of proof [that] governs such finding." We are not persuaded.

"In reviewing the sufficiency of the evidence on appeal, we look to the entire record to determine whether there is

substantial evidence to support the findings of the juvenile court. We do not pass judgment on the credibility of witnesses, attempt to resolve conflicts in the evidence, or determine where the weight of the evidence lies. Rather, we draw all reasonable inferences in support of the findings, view the record in the light most favorable to the juvenile court's order, and affirm the order even if there is other evidence that would support a contrary finding. [Citation.] When the [juvenile] court makes findings by the elevated standard of clear and convincing evidence, the substantial evidence test remains the standard of review on appeal. [Citation.] The appellant has the burden of showing that there is no evidence of a sufficiently substantial nature to support the order. [Citations.]" (*In re Cole C.* (2009) 174 Cal.App.4th 900, 915-916 (*Cole C.*).)

Moreover, when the arguments by petitioner "'only tend to establish a factual context which, *had it been credited by the trial court,* might have led to a different decision,'" such arguments are facially meritless in light of the standard of review in this court. (*In re Charmice G.* (1998) 66 Cal.App.4th 659, 664 (*Charmice G.*), quoting *In re Jason L.* (1990) 222 Cal.App.3d 1206, 1214 (*Jason L.*), italics added; see *Angela S. v. Superior Court* (1995) 36 Cal.App.4th 758, 762.)

Mother's sufficiency of evidence argument is facially meritless because it presupposes, contrary to the juvenile court's implied finding, that Father was not credible. (*Charmice G.*, *supra*, 66 Cal.App.4th at p. 664.) Mother notes that the children were taken into protective custody, declared

dependents, and removed from her custody, "primarily due to the January 3, 2009 incident, as reported by" Father. Mother claims Father's "version of the events of that evening was not only uncorroborated by any of the other individuals present that evening, but it was highly suspect as well. [Father] had an axe to grind due to the fact that [Mother] was attempting to sever her relationship with him; hence, he was hardly a reliable reporter, let alone a credible source of information." This argument effectively asks us to pass judgment on Father's credibility, resolve conflicts in the evidence in Mother's favor, and conclude that the weight of the evidence lies with her. These are things we do not do. (*Cole C.*, *supra*, 174 Cal.App.4th at pp. 915-916.)

Mother further contends that, although Father's testimony "may have been sufficient to support jurisdictional findings based on a 'preponderance of the evidence' standard (which [Mother] does *not* concede), it was *clearly insufficient under an elevated standard of clear and convincing which is necessary to support removal.*" (First italics in original; second italics added.) This argument fails because, even though the juvenile court used the elevated standard, "the substantial evidence test remains the standard of review on appeal." (*Cole C.*, *supra*, 174 Cal.App.4th at p. 916.)

Mother contends that, even taking Father's testimony at face value, the evidence was insufficient to show that the children were at risk by the time of the disposition hearing in

May 2009.[4] She relies on her statements to the social worker that Father was "out of the picture" and that she "[got] rid of him for good," and on her counsel's claim at trial that she "doesn't intend to reunify with" Father. However, the evidence showed that Mother previously had reconciled with Father after having obtained a restraining order against him. Moreover, the social worker opined that, due to Mother's lack of insight, there is little doubt she will reenact the cycle of violence. Under these circumstances, the juvenile court was not required to conclude that Mother's severance of ties with Father was permanent or that the previously existing risk to the children had abated by the time of disposition. Rather, the court could deduce that it was probable that Mother would reconcile with Father and repeat the cycle of violence. Mother's reliance on *In re Steve W.* (1990) 217 Cal.App.3d 10, in which the danger was merely speculative because the perpetrator had since been incarcerated, is misplaced. (*Id.* at pp. 22-23.)

The evidence showed that one or more children had been present during several episodes of domestic violence. During

---

[4] Mother's opening brief asserts that taking Father's story at face value is "difficult at best given the fact he had already recanted it once." The brief omits his explanation that he had recanted "at the request of [Mother], who asked him to recant so [her employer, child protective services] would not remove the children." Mother's argument that Father is not credible because he had lied *at her request* earns high marks for chutzpah. (See *People v. Whigam* (1984) 158 Cal.App.3d 1161, 1167, disapproved on other grounds in *People v. Poole* (1985) 168 Cal.App.3d 516, 524, fn. 7.)

the 2005 incident, then-nine-month-old K.B. had been in Father's arms and later had to be relocated by a sibling. During the November 3, 2007, incident, Mother left the apartment with her son because she was afraid that Father might hurt her. During the January 2009 incident, Mother was outside with two of the children when she picked up a rock and threw it at Father. In the latest incident, Mother punched Father in the mouth while the children were present in the back seat of the car. Following the incident, Mother apologized to the children.[5] "Obviously the children were put in a position of physical danger from this violence, since, for example, they could wander into the room where it was occurring and be accidentally hit by a thrown object, by a fist, arm, foot or leg, or by [a parent or sibling] falling against them." (*In re Heather A.* (1996) 52 Cal.App.4th 183, 194; see *In re Jon N.* (1986) 179 Cal.App.3d 156, 161.) Mother's argument that there was insufficient evidence of risk of substantial harm if the children were left in her custody, as required by section 361, subdivision (c)(1), has no merit. Her reliance on *In re James T.* (1987) 190 Cal.App.3d 58 for the proposition that removal was improper due to the lack of substantial risk is misplaced.

In re Paul E. (1995) 39 Cal.App.4th 996 and *In re Jeannette S.* (1978) 94 Cal.App.3d 52 are distinguishable from

---

[5] We thus reject Mother's argument that the children "suffered no harm from these incidents" because they "were not present during the arguments between" Mother and Father.

the present case because they involved dirty homes. *Jeannette S.* noted that placement in the parents' home is most frequently used in filthy home cases because such cases are the most responsive to supervision. (*Jeannette S.*, at p. 61.) Here, in contrast, amelioration of the risk posed by several years of domestic violence is far more difficult and problematic. That is especially so because the services previously furnished to Mother had utterly failed to stop the cycle of violence.

Mother relies on *In re Jasmine G.* (2000) 82 Cal.App.4th 282 (*Jasmine G.*) for the proposition that a social worker's mere opinion that parents have not adequately addressed their history of domestic violence does not constitute sufficient evidence of substantial danger to the children if returned to the parent. Mother's reliance on *Jasmine G.* is misplaced.

During the course of the proceedings in *Jasmine G.*, *supra*, 82 Cal.App.4th 282, both parents "had forsworn corporal punishment of teenagers," had "expressed remorse for having used corporal punishment on" the child, "had attended parenting classes," and had "undergone therapy to improve their parenting skills." (*Id.* at pp. 288-289.) The child "had no fear of either" parent. (*Id.* at p. 289.) "One therapist opined it was totally safe to return the child and the other simply had 'no recommendation' (in a context where it was not at all clear that . . . her 'hesitancy' went to [the child's] physical safety, as distinct from what was merely optimum). [The child] herself wanted to go home." (*Ibid.*)

Unlike *Jasmine G.*, Mother's own statements demonstrate that she is unable to appreciate the manner in which domestic violence presents a risk to her children. Moreover, Mother had a prior domestic violence history that included intervention by DHHS. The fact that domestic violence reoccurred notwithstanding that intervention demonstrates Mother is unable to learn from the services or to make real change. Mother's track record lends credence to the social worker's opinion. Removal of the children from Mother's custody is supported by sufficient evidence. (*Cole C.*, *supra*, 174 Cal.App.4th at pp. 915-916.)

II

Mother contends removal of the children from her custody was improper because there were reasonable alternative means to protect the children. (Cal. Rules of Court, rule 5.695(d)(1).)[6] We disagree.

The juvenile court found by clear and convincing evidence that there were no reasonable means by which the children's well-being could be protected without removing them from Mother's physical custody. The court further found that reasonable efforts had been made to prevent the need for removal and specifically cited to the programs that had been accessed or provided to eliminate the need for removal. (Rule 5.695(e).)

---

[6] Further references to "rules" are to the California Rules of Court.

Section 361, subdivision (d) requires the court to "state the facts on which the decision to remove the minor is based." Mother contends the court's failure to make such a statement was error. However, the omission is harmless because there is no reasonable probability that the statement, if made, would have been in favor of continued parental custody. (*Jason L.*, *supra*, 222 Cal.App.3d at p. 1218.)

Mother complains that prior to making the foregoing findings, "it appears that neither the court, nor the department, gave any thought whatsoever to alternatives to removal." Mother effectively asks us to deduce from the lack of any on-the-record rejection of ineffective "alternatives" to removal that some *effective* alternative exists. This inverts our standard of review. It is Mother's burden to identify record evidence of an effective alternative to removal. (*Cole C.*, *supra*, 174 Cal.App.4th at pp. 915-916.)

Mother claims that, since she "had severed her relationship with [Father], the children could have been placed with [Mother] under strict supervision" by DHHS and a no-contact order vis-à-vis Father. In part I, *ante*, we rejected the premise of this argument, noting the juvenile court was not required to conclude that Mother's severance of ties with Father was permanent; rather, the court could conclude that they probably would reconcile and repeat the cycle of violence. Thus, the court had no reason to believe a no-contact order would be successful. Mother has not identified any reasonable means to prevent removal. There was no error.

DISPOSITION

The judgment is affirmed.

RAYE, J.

We concur:

BLEASE, Acting P. J.

BUTZ, J.